

AMENDED IN SENATE JUNE 2, 2005
AMENDED IN SENATE MAY 27, 2005
AMENDED IN SENATE APRIL 14, 2005
AMENDED IN SENATE FEBRUARY 16, 2005

SENATE BILL

No. 33

Introduced by Senator Battin
(Principal coauthor: Senator Alquist)

December 13, 2004

~~An act to amend Section 288.1 of the Penal Code;~~ *An act to amend Sections 285, 288.1, 1000.12, and 1203.066 of, and to repeal Section 1000.13 of, the Penal Code, relating to sexual abuse.*

LEGISLATIVE COUNSEL'S DIGEST

SB 33, as amended, Battin. Child sexual abuse.

~~Existing law provides that any person convicted of committing any lewd or lascivious act upon a child under 14 years of age shall not have his or her sentence suspended until the court obtains a report as to the mental condition of that person from a reputable psychiatrist or psychologist, or from a recognized treatment program.~~

~~This bill would also provide that if the defendant is a member of the victim's household, he or she shall not be granted probation unless they are removed from the victim's household until the court determines that the best interests of the victim would be served by his or her return. This bill would also provide that while removed from the household, the court shall prohibit contact by the defendant with the victim, as specified.~~

~~Because this bill would change terms of probation, it would create a state-mandated local program.~~

~~The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.~~

~~This bill would provide that no reimbursement is required by this act for a specified reason.~~

Existing law provides that it is a crime punishable by imprisonment in the state prison for persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void to commit fornication or adultery with one another.

This bill would provide that it is a crime punishable by imprisonment in the state prison for persons within specified degrees of consanguinity who are 14 years of age or older to commit fornication or adultery with one another.

Existing law provides that any person convicted of committing any lewd or lascivious act upon a child under 14 years of age shall not have his or her sentence suspended until the court obtains a report as to the mental condition of that person from a reputable psychiatrist or psychologist, or from a recognized treatment program.

This bill would also provide that if the defendant is a member of the victim's household, he or she shall not be granted probation unless they are removed from the victim's household until the court determines that the best interests of the victim would be served by his or her return. This bill would also provide that while removed from the household, the court shall prohibit contact by the defendant with the victim, as specified.

Existing law provides that, in lieu of prosecuting a person suspected of committing an act of abuse or neglect involving a minor victim, the prosecuting attorney may refer that person for counseling and psychological treatment.

This bill would specify that these provisions only apply to a person suspected of committing physical abuse or neglect.

Existing law also provides that, in lieu of trial, the prosecuting attorney may make a motion to defer entry of judgment with respect to any crime charged in which a minor is a victim of an act of molestation or sexual abuse, upon written agreement between the prosecuting attorney and the suspect, if he or she is a family member of the victim, the person has no prior violent or sexual felony convictions, and no adverse diversion or counseling history, as specified, provided that rehabilitation is feasible, there is no threat of

harm to the minor, the charged offense is not a lewd or lascivious act or any other sexual offense committed by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, the defendant pleads guilty and completes an approved treatment program, 5 years after which, the court shall dismiss the charges against the defendant.

This bill would repeal these provisions.

Existing law provides that a person who is convicted of committing lewd and lascivious acts upon a child or engaging in continuous sexual abuse of a child, if the violation involved more than one victim, substantial sexual conduct with a victim who was under 14 years of age, or the use of obscene matter depicting sexual conduct, as specified, shall be ineligible for probation, a suspended sentence, nor shall any of the charges against him or her be dismissed, as specified, unless the court makes several findings including that the defendant is the victim's parent or relative, grant of probation is in the best interest of the child, rehabilitation of the defendant is feasible, and there is no threat of physical harm to the child.

This bill would instead provide that probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for any person convicted of committing these offenses if the existence of any fact required to prove the allegation is alleged in the accusatory pleading and either admitted by the defendant or found to be true by the trier of fact. Further, for the existence of any fact relating to lewd and lascivious acts against multiple victims, in order for these provisions to apply, the allegation must specifically reference these provisions.

This bill would make other conforming changes.

Because this bill would increase local incarceration costs and change the punishment for a crime, it would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 285 of the Penal Code is amended to*
2 *read:*

3 285. Persons being within the degrees of consanguinity
4 within which marriages are declared by law to be incestuous and
5 void, who intermarry with each other, or who *being 14 years of*
6 *age or older*, commit fornication or adultery with each other, are
7 punishable by imprisonment in the state prison.

8 *SEC. 2. Section 288.1 of the Penal Code is amended to read:*

9 288.1. (a) Any person convicted of committing any lewd or
10 lascivious act including any of the acts constituting other crimes
11 provided for in Part 1 of this code upon or with the body, or any
12 part or member thereof, of a child under the age of 14 years shall
13 not have his or her sentence suspended until the court obtains a
14 report from a reputable psychiatrist, from a reputable
15 psychologist who meets the standards set forth in Section 1027,
16 ~~or from a recognized treatment program pursuant to Section~~
17 ~~1000.12 or 1203.066,~~ as to the mental condition of that person.

18 (b) *If the defendant is a member of the victim's household,*
19 *probation shall not be granted unless the defendant is removed*
20 *from the household of the victim until the court determines that*
21 *the best interests of the victim would be served by his or her*
22 *return. While removed from the household, the court shall*
23 *prohibit contact by the defendant with the victim, with the*
24 *exception that the court may permit supervised contact, upon the*
25 *request of the director of the court ordered supervised treatment*
26 *program, and with the agreement of the victim and the victim's*
27 *parent or legal guardian, other than the defendant. As used in*
28 *this subdivision, "contact with the victim" includes all physical*
29 *contact, being in the presence of the victim, communicating by*
30 *any means, including by a third party acting on behalf of the*
31 *defendant, or sending any gifts.*

32 *SEC. 3 Section 1000.12 of the Penal Code is amended to*
33 *read:*

34 1000.12. (a) It is the intent of the Legislature that nothing in
35 this chapter deprive a prosecuting attorney of the ability to
36 prosecute any person who is suspected of committing any crime
37 in which a minor is a victim of an act of ~~molestation,~~ *physical*

1 abuse; or neglect to the fullest extent of the law, if the
2 prosecuting attorney so chooses.

3 ~~(b) Except as provided in subdivision (c), in~~ *In lieu of*
4 prosecuting a person suspected of committing any crime,
5 involving a minor victim, of an act of *physical* abuse or neglect,
6 the prosecuting attorney may refer that person to the county
7 department in charge of public social services or the probation
8 department for counseling or psychological treatment and such
9 other services as the department deems necessary. The
10 prosecuting attorney shall seek the advice of the county
11 department in charge of public social services or the probation
12 department in determining whether or not to make the referral.

13 ~~(c) (1) In lieu of trial, the prosecuting attorney may make a~~
14 ~~motion to the trial court to defer entry of judgment with respect~~
15 ~~to any crime charged in which a minor is a victim of an act of~~
16 ~~molestation or sexual abuse, provided that the defendant pleads~~
17 ~~guilty to all crimes and enhancements charged. Upon that motion~~
18 ~~and defendant's plea of guilty to all charges and enhancements,~~
19 ~~the court may defer entry of judgment, contingent upon the~~
20 ~~defendant's referral to, and completion of, a treatment program~~
21 ~~approved by the prosecuting attorney. Upon the defendant's~~
22 ~~successful completion of the treatment program, and upon the~~
23 ~~positive recommendation of the treatment program authority and~~
24 ~~the motion of the prosecuting attorney, but no sooner than five~~
25 ~~years from the date of the defendant's referral to the treatment~~
26 ~~program, the court shall dismiss the charge or charges against the~~
27 ~~defendant.~~

28 ~~(2) Upon any failure of treatment under the program described~~
29 ~~in paragraph (1), the prosecuting attorney may make a motion to~~
30 ~~the court for entry of judgment and the court shall, upon a finding~~
31 ~~of failure of treatment based on a preponderance of evidence,~~
32 ~~enter judgment upon the defendant's pleas and admissions, and~~
33 ~~schedule a sentencing hearing as otherwise provided in this code.~~

34 ~~(3) The office of the prosecuting attorney shall promulgate~~
35 ~~eligibility standards for deferred entry of judgment and treatment~~
36 ~~of defendants described in paragraph (1), which shall include, but~~
37 ~~not be limited to, all of the following:~~

38 ~~(A) Deferred entry of judgment for the defendant is in the best~~
39 ~~interests of the minor victim.~~

1 ~~(B) Rehabilitation of the defendant is feasible in a recognized~~
2 ~~treatment program, as defined in Section 1203.066, designed to~~
3 ~~deal with child molestation, abuse, or neglect, as specifically~~
4 ~~related to the charges made.~~

5 ~~(C) There is no threat of harm to the minor victim if entry of~~
6 ~~judgment is deferred.~~

7 ~~(D) No person shall be deemed eligible for deferred entry of~~
8 ~~judgment under this section unless he or she pleads guilty to all~~
9 ~~charges and enhancements.~~

10 ~~(E) Deferred entry of judgment shall not apply to any person~~
11 ~~who is charged under subdivision (b) of Section 288, or any~~
12 ~~sexual offense involving force, violence, duress, menace, or fear~~
13 ~~of immediate and unlawful bodily injury on the minor victim or~~
14 ~~another person.~~

15 ~~(F) Any person who applies for deferred entry of judgment~~
16 ~~under this section shall also meet all of the requirements for the~~
17 ~~counseling program delineated under Section 1000.13.~~

18 ~~(4) Deferred entry of judgment shall be granted upon the~~
19 ~~following terms:~~

20 ~~(A) Defendant shall seek and participate in a rehabilitation~~
21 ~~program as prescribed by the district attorney.~~

22 ~~(B) Defendant shall not use, handle, or have in his or her~~
23 ~~possession marijuana, narcotics, dangerous drugs, or controlled~~
24 ~~substances of any kind, unless lawfully prescribed for the~~
25 ~~defendant by a licensed physician.~~

26 ~~(C) Defendant shall not associate with known or reputed users~~
27 ~~or sellers of marijuana, dangerous drugs, or narcotics, or be in~~
28 ~~places where narcotics or dangerous drugs are present.~~

29 ~~(D) Defendant shall submit his or her person, property,~~
30 ~~automobile, and any object under his or her control to search and~~
31 ~~seizure in or out of the presence of the defendant, by any law~~
32 ~~enforcement officer or probation officer.~~

33 ~~(E) Unification with the family or unsupervised contact with~~
34 ~~the minor victim or any other minor shall be prohibited except~~
35 ~~upon recommendation of the treatment program and motion of~~
36 ~~the district attorney and order of the court.~~

37 ~~(F) Any violation of the law constitutes a failure of treatment.~~

38 ~~(c) This section shall not apply to any person who is charged~~
39 ~~with sexual abuse or molestation of a minor victim, or any sexual~~
40 ~~offense involving force, violence, duress, menace, or fear of~~

1 *immediate and unlawful bodily injury on the minor victim or*
2 *another person.*

3 *SEC. 4. Section 1000.13 of the Penal Code is repealed.*

4 ~~1000.13. (a) Notwithstanding Section 1000.12, no person~~
5 ~~suspected of violating any section of this code in which a minor~~
6 ~~is a victim of sexual abuse shall be referred for counseling in lieu~~
7 ~~of prosecution except upon written agreement between the~~
8 ~~prosecuting attorney and the suspected person and unless all of~~
9 ~~the following apply to the suspected person:~~

10 ~~(1) The person is a family member of the victim. For the~~
11 ~~purposes of this chapter “family member” means a parent,~~
12 ~~stepparent, sibling, aunt, uncle, cousin, grandparent, or a member~~
13 ~~of the victim’s household who has developed a family~~
14 ~~relationship with the victim.~~

15 ~~(2) The person’s criminal record does not indicate that~~
16 ~~diversion has been terminated, or probation or parole has been~~
17 ~~revoked, without thereafter being completed within the previous~~
18 ~~10 years.~~

19 ~~(3) The person has not been referred for counseling or other~~
20 ~~services pursuant to this chapter prior to the commission of the~~
21 ~~present alleged offense.~~

22 ~~(4) The person has no prior conviction for any felony sexual~~
23 ~~offense or any offense in which a minor is a victim of sexual~~
24 ~~abuse and has no conviction for any felony offense involving~~
25 ~~violence against another person during the previous 10 years in~~
26 ~~which the suspected person remained free of prison custody.~~

27 ~~(b) The prosecuting attorney may impose additional relevant~~
28 ~~criteria for determining whether to refer the suspected person~~
29 ~~under this chapter.~~

30 *SEC. 5. Section 1203.066 of the Penal Code is amended to*
31 *read:*

32 *1203.066. (a) Notwithstanding Section 1203 or any other*
33 *law, probation shall not be granted to, nor shall the execution or*
34 *imposition of sentence be suspended for, nor shall a finding*
35 *bringing the defendant within the provisions of this section be*
36 *stricken pursuant to Section 1385 for, any of the following*
37 *persons:*

38 *(1) A person who is convicted of violating Section 288 or*
39 *288.5 when the act is committed by the use of force, violence,*

1 duress, menace, or fear of immediate and unlawful bodily injury
2 on the victim or another person.

3 (2) A person who caused bodily injury on the child victim in
4 committing a violation of Section 288 or 288.5.

5 (3) A person who is convicted of a violation of Section 288 or
6 288.5 and who was a stranger to the child victim or befriended
7 the child victim for the purpose of committing an act in violation
8 of Section 288 or 288.5, unless the defendant honestly and
9 reasonably believed the victim was 14 years of age or older.

10 (4) A person who used a weapon during the commission of a
11 violation of Section 288 or 288.5.

12 (5) A person who is convicted of committing a violation of
13 Section 288 or 288.5 and who has been previously convicted of a
14 violation of Section 261, 262, 264.1, 266, 266c, 267, 285, 286,
15 288, 288.5, 288a, or 289, or of assaulting another person with
16 intent to commit a crime specified in this paragraph in violation
17 of Section 220, or who has been previously convicted in another
18 state of an offense which, if committed or attempted in this state,
19 would constitute an offense enumerated in this paragraph.

20 (6) A person who violated Section 288 or 288.5 while
21 kidnapping the child victim in violation of Section 207, 209, or
22 209.5.

23 (7) A person who is convicted of committing a violation of
24 Section 288 or 288.5 against more than one victim.

25 (8) A person who, in violating Section 288 or 288.5, has
26 substantial sexual conduct with a victim who is under 14 years of
27 age.

28 (9) A person who, in violating Section 288 or 288.5, used
29 obscene matter, as defined in Section 311, or matter, as defined
30 in Section 311, depicting sexual conduct, as defined in Section
31 311.3.

32 (b) “Substantial sexual conduct” means penetration of the
33 vagina or rectum of either the victim or the offender by the penis
34 of the other or by any foreign object, oral copulation, or
35 masturbation of either the victim or the offender.

36 ~~(c) Paragraphs (7), (8), and (9) of subdivision (a) shall not~~
37 ~~apply when the court makes all of the following findings:~~

38 ~~(1) The defendant is the victim’s natural parent, adoptive~~
39 ~~parent, stepparent, relative, or is a member of the victim’s~~
40 ~~household who has lived in the victim’s household.~~

1 ~~(2) A grant of probation to the defendant is in the best interest~~
2 ~~of the child.~~

3 ~~(3) Rehabilitation of the defendant is feasible, the defendant is~~
4 ~~amenable to undergoing treatment, and the defendant is placed in~~
5 ~~a recognized treatment program designed to deal with child~~
6 ~~molestation immediately after the grant of probation or the~~
7 ~~suspension of execution or imposition of sentence.~~

8 ~~(4) The defendant is removed from the household of the victim~~
9 ~~until the court determines that the best interests of the victim~~
10 ~~would be served by returning the defendant to the household of~~
11 ~~the victim. While removed from the household, the court shall~~
12 ~~prohibit contact by the defendant with the victim, except the~~
13 ~~court may permit the supervised contact, upon the request of the~~
14 ~~director of the court ordered supervised treatment program, and~~
15 ~~with the agreement of the victim and the victim's parent or legal~~
16 ~~guardian, other than the defendant. As used in this paragraph,~~
17 ~~"contact with the victim" includes all physical contact, being in~~
18 ~~the presence of the victim, communication by any means, any~~
19 ~~communication by a third party acting on behalf of the defendant,~~
20 ~~and any gifts.~~

21 ~~(5) There is no threat of physical harm to the child victim if~~
22 ~~probation is granted. The court upon making its findings pursuant~~
23 ~~to this subdivision is not precluded from sentencing the~~
24 ~~defendant to jail or prison, but retains the discretion not to do so.~~
25 ~~The court shall state its reasons on the record for whatever~~
26 ~~sentence it imposes on the defendant.~~

27 ~~The court shall order the psychiatrist or psychologist who is~~
28 ~~appointed pursuant to Section 288.1 to include a consideration of~~
29 ~~the factors specified in paragraphs (2), (3), and (4) in making his~~
30 ~~or her report to the court.~~

31 ~~(d) The existence of any fact that would make a person~~
32 ~~ineligible for probation under subdivision (a) shall be alleged in~~
33 ~~the accusatory pleading and either admitted by the defendant in~~
34 ~~open court or found to be true by the jury trying the issue of guilt~~
35 ~~or by the court where guilt is established by plea of guilty or nolo~~
36 ~~contendere or by trial by the court sitting without a jury.~~

37 ~~(e) As used in this section and in Section 1000.12, the~~
38 ~~following terms apply:~~

39 ~~(1) "Recognized treatment program" means a program with~~
40 ~~substantial expertise in the treatment of children who are victims~~

1 of sexual abuse, their families, and offenders, that demonstrates
2 to the court all of the following:

3 (A) An integrated program of treatment and assistance to
4 victims and their families.

5 (B) A treatment regimen designed to specifically address the
6 offense.

7 (C) The ability to serve indigent clients.

8 (2) “Integrated program of treatment and assistance to victims
9 and their families” means that the program provides all of the
10 following:

11 (A) A full range of services necessary to the recovery of the
12 victim and any nonoffending members of the victim’s family,
13 including individual, group, and family counseling as necessary.

14 (B) Interaction with the courts, social services, probation, the
15 district attorney, and other government agencies to ensure
16 appropriate help to the victim’s family.

17 (C) Appropriate supervision and treatment, as required by law,
18 for the offender.

19 (f) For purposes of this section and Section 1000.12, a
20 program that provides treatment only to offenders and does not
21 provide an integrated program of treatment and assistance to
22 victims and their families is not a recognized treatment program.

23 (c) (1) Except for a violation of subdivision (b) of Section 288,
24 this section shall only apply if the existence of any fact required
25 in subdivision (a) is alleged in the accusatory pleading and is
26 either admitted by the defendant in open court, or found to be
27 true by the trier of fact.

28 (2) For the existence of any fact under paragraph (7) of
29 subdivision (a), the allegation must be made pursuant to this
30 section.

31 SEC. 6. No reimbursement is required by this act pursuant to
32 Section 6 of Article XIII B of the California Constitution because
33 the only costs that may be incurred by a local agency or school
34 district will be incurred because this act creates a new crime or
35 infraction, eliminates a crime or infraction, or changes the
36 penalty for a crime or infraction, within the meaning of Section
37 17556 of the Government Code, or changes the definition of a
38 crime within the meaning of Section 6 of Article XIII B of the
39 California Constitution.

1 SECTION 1. ~~Section 288.1 of the Penal Code is amended to~~
2 ~~read:~~

3 ~~288.1. (a) Any person convicted of committing any lewd or~~
4 ~~lascivious act including any of the acts constituting other crimes~~
5 ~~provided for in Part 1 of this code upon or with the body, or any~~
6 ~~part or member thereof, of a child under the age of 14 years shall~~
7 ~~not have his or her sentence suspended until the court obtains a~~
8 ~~report from a reputable psychiatrist, from a reputable~~
9 ~~psychologist who meets the standards set forth in Section 1027,~~
10 ~~as to the mental condition of that person.~~

11 ~~(b) If the defendant is a member of the victim's household,~~
12 ~~probation shall not be granted unless the defendant is removed~~
13 ~~from the household of the victim until the court determines that~~
14 ~~the best interests of the victim would be served by his or her~~
15 ~~return. While removed from the household, the court shall~~
16 ~~prohibit contact by the defendant with the victim, with the~~
17 ~~exception that the court may permit supervised contact, upon the~~
18 ~~request of the director of the court ordered supervised treatment~~
19 ~~program, and with the agreement of the victim and the victim's~~
20 ~~parent or legal guardian, other than the defendant. As used in this~~
21 ~~subdivision, "contact with the victim" includes all physical~~
22 ~~contact, being in the presence of the victim, communicating by~~
23 ~~any means, including by a third party acting on behalf of the~~
24 ~~defendant, or sending any gifts.~~

25 ~~SEC. 2. No reimbursement is required by this act pursuant to~~
26 ~~Section 6 of Article XIII B of the California Constitution because~~
27 ~~the only costs that may be incurred by a local agency or school~~
28 ~~district will be incurred because this act creates a new crime or~~
29 ~~infraction, eliminates a crime or infraction, or changes the~~
30 ~~penalty for a crime or infraction, within the meaning of Section~~
31 ~~17556 of the Government Code, or changes the definition of a~~
32 ~~crime within the meaning of Section 6 of Article XIII B of the~~
33 ~~California Constitution.~~